No. 94-286

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,
v.
BEN MYRICK and EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, Executor of the Estate and Surviving Spouse of Grace C. Lindsey,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE EXISTENCE OF PREEMPTION PROVISIONS DOES NOT GENERALLY OUST CONFLICT PREEMPTION	4
II. THE SAFETY ACT DOES NOT AUTHORIZE STATE TORT LAW THAT CONFLICTS WITH FEDERAL LAW	7
III. THIS COURT SHOULD NOT DISTURB THE CONCLUSION OF ALL THREE COURTS BELOW THAT THERE IS A CONFLICT BETWEEN FEDERAL LAW AND THE STATE TORT STANDARDS ALLEGED IN THIS CASE	11
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947)	15
CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732 (1993)	9
Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992)	*passim*
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	4
Gozlon-Peretz v. United States, 498 U.S. 395 (1991)	10
Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)	16
John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517 (1993)	6
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	4
Malone v. White Motor Corp., 435 U.S. 497 (1978)	4
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)	16
Mistretta v. United States, 488 U.S. 361 (1989)	16
Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992)	6
Paccar, Inc. v. National Highway Traffic Safety Admin., 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978)	*passim*
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)	15
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)	9
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	6
Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990)	15
Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990)	3
Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)	6

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES	Page
National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392	8, 10, 12
§ 1394	12, 16
§ 1395	12
§ 1397	8
§ 1401	12
§ 1411	12
49 U.S.C. App. § 1305 (1988)	10
Sup. Ct. R. 15.1	4, 11

OTHER MATERIALS	
49 C.F.R. § 571.121 (Standard 121)	*passim*
H.R. Rep. No. 1776, 89th Cong., 2d Sess. (1966)	16
S. Rep. No. 1301, 89th Cong., 2d Sess. (1966)	8, 9, 16
NHTSA, *Heavy Truck Safety Study* (DOT HS 807 109, March 1987)	18
NHTSA, *Fleet Accident Evaluation of FMVSS 121* (DOT HS 806 261, Aug. 1981)	18
NHTSA, *Technical Assessment of FMVSS 121—Air Brake Systems* (Feb. 24, 1978), Docket No. 75-16-6R-038	19
U.S. Brief, *American Airlines, Inc. v. Wolens*, No. 93-1286 (June 1994)	9

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REPLY BRIEF FOR PETITIONERS

Respondents and their *amici* devote much of their argument to refuting the proposition advanced by several of petitioners' *amici* (*e.g.*, Amer. Tr. Ass'n *et al.* Br. 12-15; Prod. Liab. Adv. Council Br.) that the Safety Act preempts any state-law standard (whether statutory, administrative, or common law) that differs from a Safety Act standard addressed to the same matter. There is much to be said on both sides of that question, but it is not the question petitioners presented to this Court for review. And it is not the question decided by any of the three courts below.

The Eleventh Circuit and both district courts agreed that the state-law tort standards in issue here conflict with Standard 121 in the ordinary conflict-preemption sense. Judge Forrester (in *Myrick*) explained that NHTSA's post-*Paccar* "[d]eletion [from Standard 121] of the provisions that would have required anti-lock devices was intended to *promote* safety. Plaintiff's theory that failure to install such devices results in an inherently unsafe system directly conflicts with the purpose behind the amendment of Standard 121." Pet. App. 41a. Judge Shoob (in *Lindsey*) stated simply that he found Judge Forrester's holding persuasive. *Id.* at 47a. And the court of appeals also agreed, concluding that this case was indistinguishable in this respect from its earlier air-bags case. *Id.* at 10a.

The only point of disagreement between the Eleventh Circuit and the two district courts was over the legal consequences of the conflict they all agreed exists here: whether in the face of that conflict the state law nonetheless prevails. The Eleventh Circuit concluded that conflict preemption is rendered unavailable by the express preemption provisions of the Safety Act, basing that conclusion on a principle of preemption law it derived from a brief passage in this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992). The question presented to this Court is whether conflicting state tort standards do in fact survive by virtue of the principles of *Cipollone* or the provisions of the Safety Act. Pet. i; Pet. Br. i. Our opening brief argued, contrary to the Eleventh Circuit, that (a) *Cipollone* does not mean that conflict preemption is generally ousted by the presence of express preemption provisions (Pet. Br. 17-28); that (b) the Safety Act provisions in particular do not preserve state tort standards that conflict with federal law (Pet. Br. 34-42); and indeed (though unnecessary to the resolution of this case) that (c) the Safety Act expressly preempts state tort standards that conflict with federal law (Pet. Br. 30-34).

Respondents dispute all of these propositions. Resp. Br. 15-30, 34-42. Nothing they say, however, either about preemption law generally or about the Safety Act's language and legislative history in particular, remotely establishes—what no case of this Court evidently has ever before found—that Congress licensed States to defeat substantive federal regulatory determinations. *See also* NCSL *Amicus* Br. 15-24; ATLA *Amicus* Br. 16-30. The United States, for its part, agrees with our first two propositions (which suffice for reversal): neither *Cipollone* nor the Safety Act authorizes state tort law to contradict federal law. U.S. Br. 19-24. The United States could hardly do otherwise, for the Eleventh Circuit's view of *Cipollone* would jeopardize an unspecifiable but potentially vast range of federal law (U.S. Br. 20), and a construction of the Safety Act as ousting conflict preemption would require the United States to repudiate (as it is unwilling to do, U.S. Br. 28-29) its position before this Court supporting conflict preemption in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990).

In light of the flaws in the Eleventh Circuit's bases of decision, respondents (along with the United States) must find an alternative ground on which to suggest affirmance of the judgment. They accordingly contend that there is no conflict between state and federal law in this case. Resp. Br. 31-34; U.S. Br. 24-30. But this intensely standard-specific contention, requiring review of the extensive pre- and post-*Paccar* history of Standard 121, was rejected by all three courts below, has not been accepted by any other court, and was not an argument raised in the brief in opposition as a ground for denying the premise of the question presented—the presence of a conflict. Sup. Ct. R. 15.1; *see* page 11, *infra*. In any event, the contention is incorrect and should, if reached, be rejected by this Court.

I. THE EXISTENCE OF PREEMPTION PROVISIONS DOES NOT GENERALLY OUST CONFLICT PREEMPTION.

Respondents seek to defend the Eleventh Circuit's conclusion that, under *Cipollone*, when Congress writes express preemption provisions into a statute, conflict preemption is all but automatically ousted. Resp. Br. 34-42. For reasons set forth in our opening brief (at 17-28) and in the Solicitor General's brief (at 19-24), this position makes no sense, is not supported by *Cipollone*, and cannot be squared with longstanding precedent.

A. Although respondents round up the usual quotes invoking the principle that "whether state laws are 'invalid under the Supremacy Clause depends on the intent of Congress' " (Resp. Br. 38, quoting *Malone v. White Motor Co.*, 435 U.S. 497, 504 (1978)), they confuse two kinds of congressional intent: a specific *preemptive* intent, and a substantive *regulatory* intent. As the Solicitor General explains, conflict preemption, unlike both express and implied field preemption, "does not depend on a specific, affirmative intent by Congress to supersede conflicting state law." U.S. Br. 21. Conflict preemption depends only on the congressional intent behind substantive legislation or congressional intent to authorize substantive regulation through administrative proceedings. *Id.* at 20-21 (quoting and citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-43 (1977), and *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). Respondents cite not a single decision in which this Court has rejected conflict preemption for lack of specific congressional intent to displace state law, where the state law conflicted with substantive federal measures.

This absence of supporting precedent confirms that the Eleventh Circuit's position makes no constitutional or practical sense. *See* Pet. Br. 19-22. As a constitutional matter, it is perverse to suppose that Congress, when taking the trouble to single out an area for complete occupation by federal law, is by that very action otherwise

abrogating the normal supremacy of federal law over conflicting state law. *See* U.S. Br. 21. And as a practical matter, Congress cannot realistically be expected to "foresee all the possible ways in which the States might adopt measures in the future that would bear upon the federal scheme." *Id.* at 19-20. The absurdity of any presumption of perfect congressional foresight is heightened when, as in this case, the substantive regulatory determinations are not made by Congress itself but are to be made through administrative processes.

Not surprisingly, respondents back away from the Eleventh Circuit's notion that *Cipollone* makes ouster of conflict preemption virtually automatic when Congress writes express preemption provisions. Resp. Br. 38, 41. They hasten to place great emphasis on the prerequisite that the express preemption provisions constitute a " 'reliable indicium of congressional intent with respect to state authority.' " *Id.* at 38, quoting *Cipollone*, 112 S. Ct. at 2618. Of course, Congress has the power to authorize state law to contradict its enactments, but whether Congress is to be understood as having done so in a particular statute (which it apparently has never done) must be determined in light of the sensible background principles just noted. The Eleventh Circuit, however, summarily treated the "reliable indicium" condition as "not much of a hurdle," concluding that there is "a presumption that a preemption clause is a reliable indicium of congressional intent." Pet. App. 18a, 19a. But if the "reliable indicium of congressional intent" requirement is meant to have real content, as respondents now suggest, there must be firm ground for concluding that Congress intended to oust conflict preemption and authorize even *conflicting* state law. For all of the reasons we set out in our opening brief (at 24-28), nothing in *Cipollone* can reasonably be taken to establish that Congress is presumed, or can readily be deemed, to be authorizing state law to defeat federal law when it enacts an express preemption provision.

B. A long string of this Court's precedents, in fact, establishes the very opposite principle. Respondents struggle to distinguish those precedents on their facts (Resp. Br. 39-40), but there is no mistaking that this Court has repeatedly affirmed—in decisions as recent as the past several Terms (*John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993); *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992))—the principle that even broad *anti*preemption provisions must presumptively be read *not* to preserve state laws in conflict with substantive federal law. *See* Pet. Br. 22-23. Congress must be understood to have legislated against the background of this well-established principle of statutory construction, which is grounded in the basic command of the Supremacy Clause. *Cf. Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992) ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve . . . a violation of the Commerce Clause . . . ." (citing cases)).

The Eleventh Circuit's reading of *Cipollone* is inconsistent with settled understandings reflected in precedent in another, equally telling sense—namely, through what is noticeably missing from this Court's precedents. If the Eleventh Circuit were correct, virtually every statute containing provisions addressed to preemption, which are commonly (if not necessarily) circumscribed in scope, would be read as authorizing a range of state interference with substantive federal policies (outside the reach of the preemption provisions). Yet respondents and their *amici* have not pointed to a single case in which this Court has ever found that Congress meant to authorize States to defeat substantive federal law.

Respondents and one of their *amici* (Resp. Br. 12-13, 42; ATLA *Amicus* Br. 7-8) attempt to suggest that a different rule may apply where state *tort* law is at issue, relying on this Court's statement in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984), that Congress

should not be presumed to "remove all means of judicial recourse for those injured by illegal conduct." But this unelaborated suggestion is wrong for two equally fundamental reasons. First, it confuses field preemption (express or implied) with conflict preemption. *Silkwood* involved only a claim of exclusive federal *authority* in the field of nuclear safety; it did not involve a tort remedy based on a state standard in conflict with any federal safety standard. Neither *Silkwood* nor any other precedent cited by respondents and their *amici*, in finding that Congress had allowed a certain "tension" in selective overlapping federal and state *authority* (U.S. Br. 17), has found congressional approval of state law that *conflicts* with substantive federal regulatory standards.[1]

Second, respondents' *Silkwood*-based suggestion is just as deeply wrong regarding the congressional understandings about tort law that may sensibly be presumed. In our legal system, as ATLA expressly recognizes, tort law generally provides relief only for "wrongful" conduct. ATLA *Amicus* Br. 11; *id.* at 23 ("tortious" injury); Resp. Br. 12 (" 'tortious conduct' "). What conflict preemption means is that conduct cannot be deemed wrongful based on a state standard that conflicts with federal law. Quite simply, it would be every bit as anomalous to presume congressional *preservation* of a damages remedy based on such a standard, which would amount to a tort remedy for conduct that cannot be deemed wrongful, as it would be to presume congressional *displacement* of tort remedies for "illegal" conduct.

II. THE SAFETY ACT DOES NOT AUTHORIZE STATE TORT LAW THAT CONFLICTS WITH FEDERAL LAW.

Shorn of the general rule of preemption law improperly read into *Cipollone*, respondents' defense of the Eleventh Circuit's repudiation of conflict preemption requires a

[1] Notably, when the United States adverts to a "tension" in the Safety Act (U.S. Br. 17), it is referring only to express preemption and only to state standards that are "stricter than" NHTSA's standards, not to any conflict preemption.

demonstration that, in the Safety Act, Congress actually meant to preserve state tort law even when it conflicts with federal law in the ordinary conflict-preemption sense. Such a conclusion would mean, of course, that state tort law could impose liability for conduct that federal law explicitly required and, in addition, that the Safety Act evidently would be the first federal statute ever to come before this Court authorizing such state-law defeat of federal law. Not surprisingly, respondents do not come close to establishing that interpretation of the Safety Act.

A. Although respondents extensively set out not only the language of Section 1392(d) and Section 1397(k) but also excerpts from the legislative history of the Safety Act (Resp. Br. 15-30), a simple perusal of those passages shows that none of the materials remotely discloses a congressional intent to allow state-law standards that conflict with substantive federal standards. The language of Section 1392(d), which is a *pro*-preemption provision, hardly accomplishes such ouster of conflict preemption. The language of Section 1397(k), which says only that mere "compliance" with federal standards does not "exempt" manufacturers from common law liability, could not, without considerable awkwardness, be read as meaning that tort liability could be imposed based on state standards that are in conflict with federal standards. And like the language of Section 1397(k), all of the numerous quoted excerpts from the legislative history are apposite only to the dispute (which petitioners do not enter) as to whether common-law liability is permitted based on state standards that go beyond federal standards. There is no expression of any intent to authorize state tort liability based on standards that conflict with federal standards as "interpreted" by the courts (S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966)).[2]

[2] The Solicitor General comes to the same conclusion. Reviewing the same legislative materials (U.S. Br. 10-18), he concludes that "[t]he legislative history . . . confirms that Congress intended that manufacturers could be held liable in tort, even if their vehicles complied with all relevant federal safety standards" (*id.* at 14). In elaborating (*id.* at 14-18), he carefully avoids stating

B. That is enough to negate the Eleventh Circuit's reading of the Safety Act as ousting conflict preemption. This Court need not go any further. In fact, however, a fair reading of the statute establishes express preemption of state tort standards that conflict with federal standards addressing the same aspect of performance.[3]

As the Solicitor General acknowledges—*see* U.S. Br. 13, citing the 1966 Senate Report, *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737-38 (1993), and *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959)—the language of Section 1392(d), which preempts "safety standard[s]," is naturally read as encompassing state tort-law standards.[4] And in the context

that the preserved tort standards include those in conflict with federal standards, speaking instead only of "safety standards *stricter than* the standards prescribed by NHTSA." *Id.* at 17 (emphasis added). Ultimately, he expressly concludes that the Safety Act does not foreclose conflict preemption. *Id.* at 19-24.

[3] In our opening brief, we noted at three places (pp. 29 & n.16, 34 n.24, 37 n.28) some of the analysis that would bear on the question whether the Safety Act preempts or preserves state tort standards that go beyond, but do not contradict, federal standards. But we have presented this case to the Court (Pet. i) and have argued for reversal only on the premise, accepted by the Eleventh Circuit, that the state-law standards alleged by respondents conflict with federal law. Accordingly, this Court has no occasion to address the extensive arguments of respondents and their *amici* about whether Section 1392(d) and 1397(k) together preserve or preempt all non-identical state common-law safety standards.

[4] The Solicitor General casually suggests at one point that "standard" is a *narrower* term than either "order" or "requirement" and that, while a State may "establish" or "continue in effect" a standard through its legislative or administrative authorities, it does not do so through its judiciary. U.S. Br. 14. Both suggestions are baseless, even linguistically bizarre. Strikingly, the suggestions are inconsistent with the Solicitor General's recent construction of the preemption provision at issue in *American Airlines, Inc. v. Wolens*, No. 93-1286 (argued Nov. 1, 1994): he argued there that (non-contract) common-law duties *are* within the class of "state standards" (Br. 29; *id.* at 16, 17, 28) that a

of the Safety Act, that reading is the only fair one, for three compelling reasons. First, the phrase must be construed in light of the underlying policy (*e.g., Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991)), and the policy of uniformity behind Section 1392(d) by itself requires inclusion of tort standards. Second, the provision must be construed so as not to drain Section 1397(k) of meaning—a principle endorsed by respondents themselves (Resp. Br. 28)—yet if common-law standards were outside the preemption provision, "there would be no reason for the savings provision" (*ibid.*). Third, limiting Section 1392(d) to "prescriptive rule[s] affirmatively promulgated by a legislative or administrative body," as the Solicitor General proposes (U.S. Br. 14), creates an incoherent regime in which legislatively codified tort law (including one of respondents' causes of action, *see* Pet. Br. 16 n.9) is covered by the provision, but the uncodified common law of torts (respondents' other cause of action) is not.

For those reasons, the only fair reading of Section 1392(d) is that its preemptive reach embraces common-law tort standards. Of course, the analysis cannot stop there, but must go on to examine Section 1397(k). But the language and legislative history of that provision, as we have discussed, are not enough to preserve *conflicting* state standards under tort law and thus do not, as to such standards, undo the preemption effected by Section 1392(d).

State may not "enact or enforce" under the statute (49 U.S.C. App. § 1305(a)(1) (1988)).

Amicus ATLA, for its part, advances an argument squarely rejected in *Cipollone*—that tort law does not impose any "requirement" on defendants. ATLA *Amicus* Br. 11.

III. THIS COURT SHOULD NOT DISTURB THE CONCLUSION OF ALL THREE COURTS BELOW THAT THERE IS A CONFLICT BETWEEN FEDERAL LAW AND THE STATE TORT STANDARDS ALLEGED IN THIS CASE.

Respondents make one final argument—in which they are now joined by the United States—for affirmance of the judgment below, raising an alternative ground that, as they do not dispute, was rejected by all three courts below. In particular, they challenge the conclusion of the Eleventh Circuit and both district courts that the state-law tort duty alleged by respondents conflicts with the federal determination embodied in Standard 121. Resp. Br. 30-34; U.S. Br. 24-30. That conclusion, which is limited to the particular federal safety standard and state-law standards at issue in this case, should not be disturbed by this Court.

There is no need for the Court to address this standard-specific issue: the conclusion of the three lower courts is uncontradicted by any other judicial decision. And there is good reason for the Court not to address this issue. Respondents' brief in opposition, which focused almost exclusively on the merits of the Eleventh Circuit's decision, questioned the existence of a conflict on only one ground, namely, that Standard 121 could not conflict with any state-law requirement of ABS devices because it does not ban such devices. Br. in Opp. 24, 26. *See also id.* at i. Aside from that claim—which is contrary to settled conflict-preemption principles, as the United States recognizes in standing by the airbags preemption decisions—respondents offered no reason to question the federal-state conflict that formed the premise of the question presented; in particular, they did not present the complex claims now raised about the precise significance of the whole pre- and post-*Paccar* history of Standard 121. These claims were not adequately raised in the brief in opposition (Sup. Ct. R. 15.1), and this Reply Brief is hardly the place to review the extensive relevant materials in detail. *See* note 9, *infra* (brief review). In any

event, as we now discuss, if the Court reaches these claims, it should agree with the courts below that a conflict indeed exists here.

A. As in any case involving conflict preemption, the analysis requires careful attention to the two sides of the equation: the specific federal determination at issue; and the specific state law at issue. On the federal side, the process that Congress put in place for lawmaking under the Safety Act—lengthy rulemaking proceedings, based on extensive research, testing, information gathering, and public comment, followed by judicial review to ensure an analysis consistent with Safety Act and APA standards (15 U.S.C. §§ 1392, 1394, 1395, 1401, 1411)—produced a clear determination that the "comprehensive" record permitted one and only one lawful conclusion: that, because of the complex aspects of the underlying air brakes that NHTSA had newly required, safety considerations could not support, indeed undermined, any *per se* requirement of antilock brake systems. *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 639, 643 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). On the state side of the equation, respondents would have that very requirement imposed under Georgia law on the ground that it was unreasonably unsafe for any manufacturer *not* to install antilock brake systems. *See* Pet. Br. 16 & n.9 (citing Georgia standards invoked by respondents). This, as the courts below concluded, is the basis for classic conflict preemption.

B. Respondents choose to attack this conclusion by focusing on—and mischaracterizing—what is on the state-law side of the equation. Without citing any of their prior pleadings or briefs in this case, or the Georgia law that they have invoked (Resp. Br. 10, 11, 33), they declare that their claim is that "it was tortious for *particular* truck manufacturers to fail to install [ABS] devices on *particular* trucks." Resp. Br. 33 (emphasis added). But that is manifestly not the state-law standard of conduct they have alleged throughout this case. From the beginning,

their claim consistently has been nothing other than that it was *per se* unreasonable for *any* truck manufacturer to have omitted ABS after 1980.[5] That is the claim they presented to the district courts and to the Eleventh Circuit (*see* Pet. App. 3a, 4a, 34a, 40a, 47a), and that is the only claim at issue.

C. The Solicitor General and NHTSA concentrate on the federal-law side of the "conflict" equation. U.S. Br. 24-30. Raising issues not presented by the petition or brief in opposition, the Solicitor General and NHTSA concentrate on questioning the very existence of the federal-law determination regarding an ABS requirement. Secondarily, they try to shrug off the substance of the determination. They are wrong on both scores.

1. The Solicitor General and NHTSA's position that there really is no relevant federal determination rests on two grounds. First, they say that once Standard 121 explicitly declared that no ABS requirement applied to trucks and trailers, the situation became "the same as if NHTSA had never instituted rulemaking concerning stopping distances for trucks and trailers, or had done so but never issued any standard." U.S. Br. 27. Second, carefully avoiding any discussion of *Paccar*'s holding that the rulemaking record compelled the determination that an ABS requirement would be unreasonably dangerous (U.S. Br. 26-30), the Solicitor General and NHTSA repeatedly emphasize that *NHTSA*, as opposed to the court of ap-

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[5] In response to the motions for summary judgment, and in seeking reversal in the court of appeals, respondents never advanced any argument or evidence purporting to distinguish some trucks from others, or some manufacturers from others, with respect to the installation of ABS. Instead, they relied on the simple claim that they had "presented unrebutted evidence that prior to the time of manufacture of the vehicles in question, antilock brakes could be reliably manufactured in mass production, and any tractor or trailer made after 1980 without antilock brakes is defective and unreasonably dangerous." C.A. Br. of Appellants 27-28. *See* Reply Br. of Appellants 15 (same). *See also* J.A. 15 (single affidavit opposing summary judgment).

peals, "has not made any such determination." *Id.* at 27; *see id.* at 30 (Standard 121 "does not reflect any determination *by NHTSA* that installation of ABS devices would be contrary to the safety objectives of the Act" (emphasis added)). Respondents echo the latter point. Resp. Br. 32 (rather than NHTSA, "it was the Ninth Circuit . . . that concluded that . . . 'there is a strong probability that the performance of a *substantial number of vehicles*' was rendered 'potentially more hazardous' by the installation of antilock devices . . ." (emphasis added by respondents)).

a. The claim that the situation is "as if" there were no regulation is quite literally fanciful. Of course, there *is* a regulation, which expressly declares that antilock devices ("which were effectively mandated" by the stopping-distance requirements, U.S. Br. 5) are not required for trucks and trailers. Standard 121 § S3. (The regulations also address numerous other aspects of air brake systems.[6]) And the plain reality is that the regulation's rejection of an ABS requirement is anything but a result of inadvertence, agenda priorities, or failure to consider the matter, as the Solicitor General and NHTSA ask this Court to pretend. The Court has only to look at the pre-*Paccar* and post-*Paccar* history of Standard 121—including years of hearings, extensive revisions in proposed rules, judicial review of the comprehensive record, and agency staff recognition of the substantive safety problems established by the record (*see* Pet. Br. 4-9)—to conclude that Standard 121's rejection of an ABS requirement embodies a determination on the merits of the safety question.

[6] The district court in *Myrick* described some of the numerous requirements, all designed to produce safer stopping of vehicles: "all other aspects of air brake systems on trucks and trailers are regulated by Standard 121, including: reservoirs; towing vehicle protection systems; pressure gauges and warning systems; brake actuation, release, and recovery times; deceleration rates and temperatures; parking brake systems; and road testing. Plaintiffs' claim that truck and trailer braking systems are no longer regulated after *Paccar* is untenable." Pet. App. 41a.

Thus, the history of Standard 121 makes unmistakable that, even more than in the airbags cases that the Solicitor General continues to endorse (U.S. Br. 28-29),[7] there is a substantive federal determination that the requirement at issue would be incompatible with the policies of the statute. Even aside from the plain existence of a regulation on the subject, this determination establishes the federal law for conflict-preemption purposes. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947). In refusing to accept this fact, the Solicitor General and NHTSA are simply continuing their resistance to the Ninth Circuit's decision in *Paccar*, from which they unsuccessfully sought certiorari.

b. The Solicitor General and NHTSA are also wrong in narrowing their focus to *NHTSA*'s determinations and wholly ignoring the judicial review to which NHTSA's actions were subjected. Federal-law determinations are not somehow personal to the administrative agency. Such determinations have the character of a "law of the United States" with preemptive force under the Supremacy Clause (U.S. Const., Art. VI, cl. 2) because they are the result of a properly constituted legal *process*. And under the

[7] The United States seeks to reconcile its position here with its brief *amicus curiae* to this Court in *Wood*, suggesting that the airbags standard (Standard 208) offers an option in a way that Standard 121 does not. U.S. Br. 28-29. But since it is the substantive safety policies of the Safety Act that matter for preemption purposes, this suggestion gets matters backwards. In *Wood*, the United States relied principally on considerations of "public acceptance" (U.S. Br. 28) to justify the airbags option. In contrast to this vague and rather political concern, the basis for the rejection of the ABS requirement, as set forth by the court of appeals in *Paccar*, was directly concerned with safety: the unexplained and potentially deadly failure of ABS devices adapted for use on heavy trucks. *See* Pet. Br. 7. The Eleventh Circuit thus rightly did not try to distinguish *Wood*, recognizing the obvious: that it could not allow liability here without overruling its own prior airbags decision in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990).

Safety Act, as under virtually every federal statute delegating regulatory authority to administrative agencies, the process begins but does not end with the agency.

Rather, Congress has provided for judicial review as a crucial part of the full rulemaking process, thus ensuring compliance with the authorizing statute, with fundamental duties of reasoned and well-grounded decisionmaking, and, indeed, with the Constitution's non-delegation doctrine (*e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371-73 (1989)). *See* 15 U.S.C. § 1394. Congress plainly intended the court's role in the full regulatory process under the Safety Act to be a serious one, providing that the court may even order the taking of additional evidence, over and above what the agency considered. § 1394(a)(2). *See also* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966) ("the committee specifically provides for judicial review of any order issued under [Section 1392]"); *id.* at 20-21 (stressing court's duty to examine entire record); S. Rep. No. 1301, *supra*, at 8 (noting courts' power to stay agency rule pending review). Thus, particularly for Supremacy Clause purposes, "[t]he court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (Leventhal, J.), *cert. denied*, 403 U.S. 923 (1971); *see, e.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 552-57 (1990) (interaction of agency and D.C. Circuit led to federal policy).

The courts may not, of course, make determinations that are committed to an agency's discretion under a statute. *Cf.* U.S. Br. 26 n.13. But that is not what the court of appeals did in *Paccar*, though the Solicitor General and NHTSA contended otherwise in unsuccessfully seeking certiorari more than 15 years ago. Instead, the court performed the proper and familiar role of determining that the comprehensive record permitted only one lawful conclusion, leaving the agency no discretion on that record to draw any other conclusion. 573 F.2d at 639, 643.

NHTSA cannot properly deny the existence of the relevant determination by pointing to its own initial *unlawful* refusal to make that determination. When that illegality was corrected after *Paccar*, the result was the federal determination on which conflict preemption below was premised: "a common law standard requiring the installation of anti-lock devices . . . would defeat the policy behind the Safety Act by imposing a design requirement that the Department of Transportation judges to be unsafe, having chosen not to require such devices until they are more reliable." Pet. App. 41a (Forrester, J.).[8]

2. Once the Solicitor General and NHTSA turn their attention beyond the confines of the agency's own actions, and look to the court of appeals ruling in *Paccar* as part of the full administrative process, they largely ignore the substance of the federal-law determination that resulted. In a brief review of the Ninth Circuit's decision (U.S. Br. 25-26), they correctly note what was *not* decided (and what is quite irrelevant here): NHTSA was not ordered to prohibit antilock devices and was not precluded from developing a new record—"after further review (or after subsequent technological advances)"—that might justify an ABS requirement. *Id.* at 26. But the Solicitor General and NHTSA then devote precisely one sentence to saying what the Ninth Circuit *did* determine, characterizing the *Paccar* decision as based on an evidentiary deficiency in the agency record. U.S. Br. 25.

This is incorrect. The *Paccar* court explained: "the comprehensive data before us indicate that there is a strong probability that the performance of a substantial number of vehicles whose braking systems have been

[8] To the extent that the Solicitor General asks in passing for deference to the agency's view of the scope and meaning of the revised Standard 121 (U.S. Br. 29 n.17), this is but another attempt to relitigate *Paccar*. Whatever deference NHTSA is owed in this specific regard was exhausted in that proceeding, which concluded that an ABS requirement was affirmatively dangerous. To overcome that conclusion the agency must formulate and justify a new standard, not seek by indirection to reinstate the old one.

altered to include 'overpowered' front axles and antilock devices has created a potentially more hazardous highway situation than existed before the Standard became operative." 573 F.2d at 643. NHTSA's own response to the 1978 *Paccar* decision, which was *not* to try to fill in supposed gaps in the evidentiary record, confirms that the problem was not one of insufficiently collected evidence. Rather, the "comprehensive" record showed that requiring ABS on all trucks presented a substantive safety problem for many trucks, because of the complex new requirements imposed on the underlying air brake systems themselves. 573 F.2d at 643. And NHTSA's technical staff has repeatedly confirmed this.[9]

[9] *See* Pet. Br. 9 & n.5. For example, a NHTSA staff study in 1987 (NHTSA, *Heavy Truck Safety Study* 86-87 (DOT HS 807 109, March 1987)) explained: "In the early to mid-1970's, NHTSA, through the requirements of FMVSS 121, attempted to establish a set of performance requirements for medium/heavy vehicle air-brake systems. The standard established requirements for brake timing, emergency braking capability, fade and recovery, parking brakes, component/subsystem performance, and short stopping distances without wheel lockup. One of the impacts of this standard was a significant increase in air-brake system complexity—a situation which proved to be troublesome to the industry mainly because they were not fully prepared to maintain the new technology. Also, the lack of reliability associated with the initial antilock systems was the principal reason that the stopping distance requirements, which necessitated the use of antilock brake systems, were struck down by the courts. Since that time, attempts have been made by both industry and government to identify and solve the various problems associated with U.S. air-brake systems, many of which surfaced as a result of having to deal with the original requirements of FMVSS 121 and the numerous modifications that have been made to the standard over the years." That study further noted the inherent engineering tension, confirmed by experience, between improving brake performance in normal circumstances (gradual stopping) and improving performance in extreme circumstances (sudden stopping). *Id.* at 86.

A 1981 NHTSA study of trucks equipped with ABS under the pre-*Paccar* Standard 121 (NHTSA, *Fleet Accident Evaluation of FMVSS 121* 18 (DOT HS 806 261 Aug. 1981)) described the widespread maintenance and reliability problems that plagued ABS devices in conjunction with the more complex air brake systems required by Standard 121 itself. *Id.* at 18-19. And it pointed to

It is beside the point that ABS devices were permitted after *Paccar*, were installed by some truck manufacturers in 1978, and have come into increasing use among truck manufacturers, including petitioners, over the years. It was the imposition of an ABS requirement on *all* truck manufacturers, in all their variety of configurations and operating circumstances, that posed the safety problems underlying the *Paccar* determination and Standard 121's subsequent rejection of an ABS requirement. The determination made in the process leading to *Paccar* and Standard 121, and the only determination relevant here, is that the state of engineering and actual operating environments made a *uniform* ABS requirement flatly unjustifiable in the very safety terms respondents now invoke under Georgia law.

If NHTSA now believes that the safety problems have been resolved, the proper course is to promulgate the proposed regulation requiring ABS that it has had pending for several years. The situation is no different from what NHTSA would have to do if it had a red-blinker standard and concluded that yellow was safer; it would have to change the standard, and until such time, tort liability for using red would be preempted. So here: there is no basis for disregarding the clear outstanding federal determination that safety concerns cannot support (but actually undermine) a *per se* requirement of antilock brake systems. As Judge Forrester explained, respondents' "theory that failure to install such devices results in an inherently unsafe system directly conflicts with" that determination. Pet. App. 41a. The district courts and the Eleventh Circuit were accordingly correct to find that this case falls squarely within the law of conflict preemption.

evidence "that requiring brake systems to be designed to achieve shorter wheels-unlocked stopping distances results in reductions in vehicle stability." *Id.* at 19 (footnote omitted). *See also* NHTSA, *Technical Assessment of FMVSS 121—Air Brake Systems* (Feb. 24, 1978), Docket No. 75-16-6R-038, Apps. H, I.

CONCLUSION

The judgment of the court of appeals should be reversed.

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